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No. 899

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Supreme Court of the United States

(October Term, A.D. 1945)

THE FEDERAL NATIONAL BANK, of Shawnee, Oklahoma,
a corporation,
Petitioner,

VERSUS

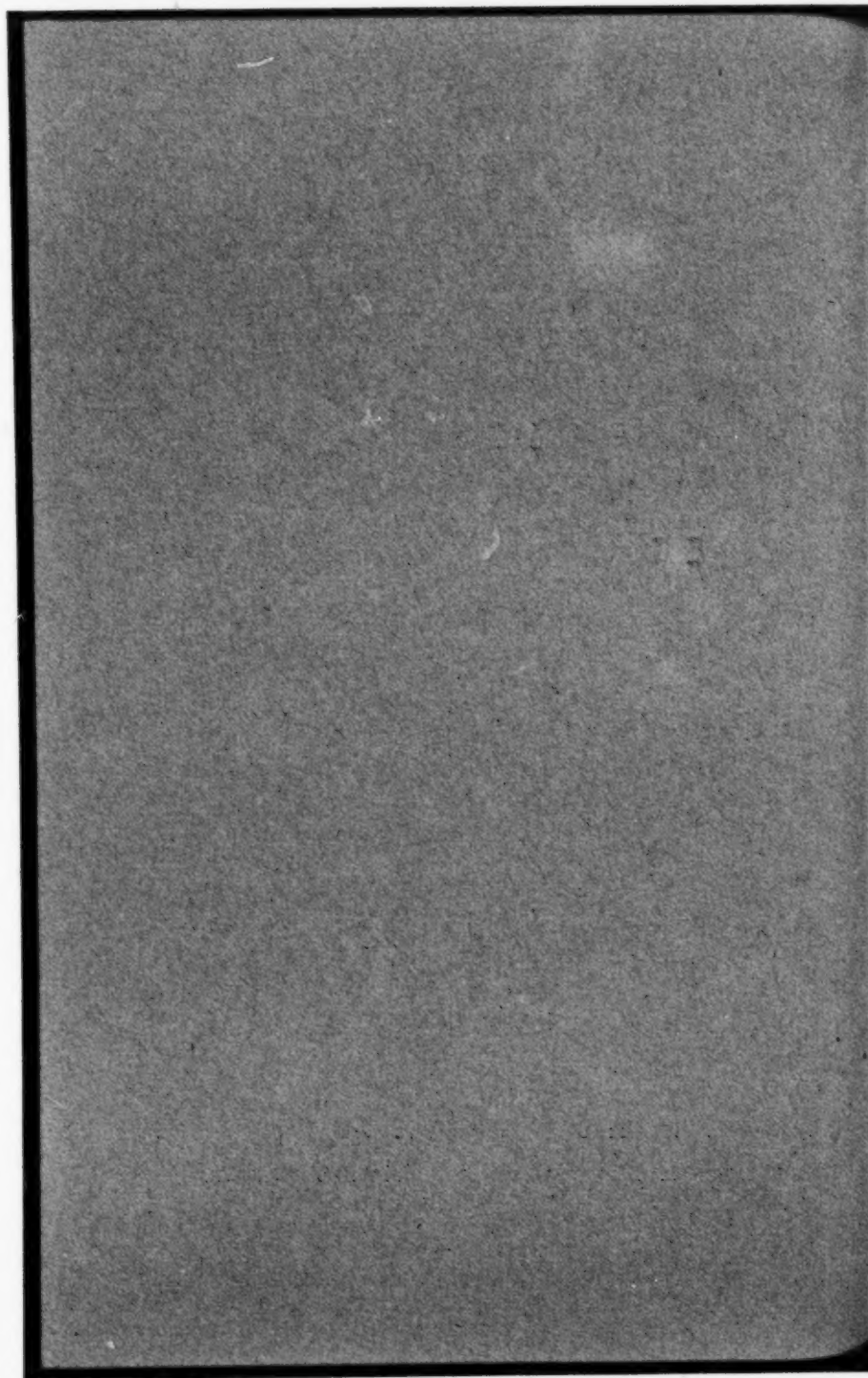
THE CONTINENTAL SUPPLY COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE TENTH CIRCUIT
IN SUPPORT THEREOF

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February, 1946.



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No.

Supreme Court of the United States
(OCTOBER TERM, A. D. 1945)

THE FEDERAL NATIONAL BANK, of Shawnee, Oklahoma,
a corporation,
Petitioner,
V E R S U S

THE CONTINENTAL SUPPLY COMPANY,
a corporation,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE TENTH CIRCUIT AND BRIEF
IN SUPPORT THEREOF**

PETITION FOR WRIT OF CERTIORARI

*To the Honorable, the Justices of the Supreme Court of
the United States:*

Comes now The Federal National Bank, of Shawnee, Oklahoma, a corporation, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and decree of the United States Circuit Court of Appeals for the Tenth Circuit, rendered and entered on the 29th day of November, 1945, in the case lately pending in said United States Circuit Court of Appeals for the Tenth Circuit, styled The Continental Supply Company,

a corporation, Appellant, v. H. G. Marshall, and The Federal National Bank, Shawnee, Oklahoma, Appellees, being No. 3057 of causes on the docket of said United States Circuit Court of Appeals for the Tenth Circuit, reversing the decree of the United States District Court for the Western District of Oklahoma in said cause in favor of the petitioner and against respondent herein; which said decree of the United States Circuit Court of Appeals for the Tenth Circuit became final on the 23rd day of January, 1946, by the denying by that Court of petitioner's petition for a rehearing.

OPINIONS IN THE COURTS BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit in said cause of The Continental Supply Company, a corporation (plaintiff-appellant) v. H. G. Marshall and The Federal National Bank, Shawnee, Oklahoma (defendant-appellee), which petitioner here seeks to have reviewed, is not yet officially reported, but appears on pages 210 to 225 of the transcript of the printed record filed herewith.

The opinion of the district court is reported in 52 Fed. Supp. at page 717, and is found on pages 40 to 50 of the transcript of record filed herein.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The material controlling facts are:

On July 23, 1941, H. G. Marshall, an oil operator, mortgaged to the petitioner, The Federal National Bank, of Shawnee, Oklahoma, his undivided $\frac{1}{4}$ th interest in certain oil and gas leases known as the Pensoneau and Whitehead leases, located in Pottawatomie County, Oklahoma, together with the personal property located thereon and the oil and gas produced therefrom; the two mortgages, with the exception of the descriptions of the oil and gas leases, were identical in terms, each securing a note of \$20,000.00 and providing for the securing of future advances or indebtedness not to exceed the sum of \$20,000.00 (R. 187-193; 205-207). Both mortgages were recorded as chattel mortgages and as real estate mortgages on the date of their execution (R. 211). Contemporaneously and in accordance with the terms of the mortgages, Marshall executed division orders to the purchaser of the oil and gas from the leases, directing it to pay the proceeds of the oil and gas produced from his interest in the leasehold estates to the "Federal National Bank for H. G. Marshall," and from and after July 30, 1941, until November 30, 1942, the proceeds from the oil produced and sold were paid to the Bank in accordance with the division orders, and by it deposited to the checking account of Marshall, who paid the proportionate share of the operating costs to the operating partner on each of the leasehold estates.

On April 18, 1942, there was recorded in Pottawatomie

County, Oklahoma, a mortgage executed by H. G. Marshall to the Continental Supply Company, respondent, to secure the sum of \$47,137.31, upon one-half of his interest in the Pensoneau and Whitehead lease (R. 18-21). This mortgage expressly recited that it was subject to the prior mortgages of The Federal National Bank. On October 10, 1942, the Supply Company commenced an action in the United States District Court for the Western District of Oklahoma against Marshall and The Federal National Bank, claiming that the mortgage of the Bank had been paid and that the Bank had received money from the oil and gas runs in excess of its mortgaged indebtedness and asking for a judgment against the Bank for an accounting and for the amount of the excess oil and gas runs, asserted to be \$25,075.86, and for a receiver, foreclosure of its mortgage and other relief. The United States District Court, after trial, rendered judgment in favor of the Supply Company against Marshall and ordered a foreclosure of the mortgage security. The court found that the Supply Company should not recover against the Bank and rendered judgment in favor of the Bank giving it a first and prior lien upon the Pensoneau and Whitehead lease interest to secure the payment of an unpaid balance upon its mortgages of \$1,547.76. (Judgment, 59-62). Jurisdiction of the U. S. Court was based exclusively on diversity of citizenship.

The Supply Company appealed contending that all advances made by the Bank to Marshall after actual notice to the Bank of the existence of the mortgage to Continental

should be subordinated to the lien of the mortgage of the Supply Company under the rule laid down in the Washington case of *Elmendorf-Anthony Co. v. Dunn et al.*, 116 Pac. (2d) 253, 138 A. L. R. 558, and further contending that by reason of certain errors committed by the trial court in the accounting (which are not material here) that a proper accounting would show the Bank indebted to the Supply Company for the amount claimed in its petition.

Both in the trial court and in the Circuit Court of Appeals the Bank contended that its mortgages, insofar as the oil and gas runs were concerned, were chattel mortgages under Oklahoma law and that by virtue of the Oklahoma statute, same being Section 75, Title 46, Oklahoma Statutes Annotated 1941, reading:

"Any chattel mortgage may secure future advances to be made by the mortgagee or assignee, at this or its option for any purpose, but not to exceed in the aggregate an amount stated in said mortgage; and all advances so made shall be secured by such mortgage equally, to the same extent and with the same priority, as the amount originally advanced on the security of such mortgage and such advances may be made and repaid and again made and the amount so stated shall be considered only as the total amount of such advances as may be outstanding at one time,"

the law of other jurisdictions pertaining to future advances would not apply and the Supply Company was therefore not entitled to an accounting concerning loans made by the Bank to Marshall after the execution of the mortgage

to Continental, inasmuch as the statute gave such advances, the same priority as was held by the original indebtedness secured by such mortgages. The Circuit Court of Appeals declined to follow the Oklahoma statute, saying that the mortgages of the Bank should be considered as real estate mortgages in their entirety and after finding that the trial court had made certain errors in its accounting vacated the judgment in favor of the Bank and reversed the cause, with directions to the trial court to proceed with an accounting against the Bank in accordance with the views expressed in the opinion. Inasmuch as Marshall has no interest in this proceeding and is not affected thereby only the Bank is asking certiorari.

In its opinion the Circuit Court of Appeals recognized that under Oklahoma law a valid chattel mortgage upon oil and gas to be produced could be given; that the mortgages from Marshall to the Bank contained such valid chattel mortgages; but held that the mortgages of the Bank as a whole were required under Oklahoma law to be recorded as instruments relating to real estate and were therefore real estate mortgages.

The decision of the United States Circuit Court of Appeals for the Tenth Circuit was rendered on the 29th day of November, 1945, and within the time required under the rules of said Court petitioner filed petition for rehearing, calling attention to the Oklahoma law applicable and urging that the Circuit Court of Appeals had failed to follow the Oklahoma law (R. 227-249). On January 23, 1946, petition for rehearing was denied (R. 258).

The duly certified record, including all the proceedings in said cause in said United States District Court for the Western District of Oklahoma and the United States Circuit Court of Appeals for the Tenth Circuit is filed herewith under separate cover. If the Circuit Court of Appeals was right in the refusal to follow the Oklahoma statute, then a reversal of the case was proper. If it was wrong, then the judgment of the U. S. District Court should have been affirmed; all errors in the accounting being immaterial, and harmless, unless the lien of the Continental Mortgage is given priority over the advances made by the Bank to Marshall after the execution of the Continental Mortgage.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by Act of February 13, 1925, and that portion of Subsection (b) of Paragraph five (5) of Rule thirty-eight (38) of Revised Rules of the Supreme Court of the United States, made in pursuance thereof, viz:

“Where a circuit court of appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.”

This cause originated in the United States District Court for the Western District of Oklahoma and was reviewed on appeal by the United States Circuit Court of Appeals for the Tenth Circuit.

The opinion of the Circuit Court of Appeals was filed on November 29, 1945, but petition for rehearing was filed in time allowed under rules of said Court and denied, and final decree was entered on January 23, 1946.

Cases thought to sustain the jurisdiction are:

—*Rorick v. Devon Syndicate*, 307 U. S. 299, 83 L. Ed. 1303;

Fidelity Union Trust Company v. Field, 311 U. S. 169, 85 L. Ed. 109;

West v. American Tel. & Tel. Company, 311 U. S. 223, 85 L. Ed. 139;

Meredith v. Winterhaven, 320 U. S. 228, 88 L. Ed. 9;

Cities Service Oil Company v. Dunlap, 308 U. S. 208, 84 L. Ed. 196;

Guaranty Trust Company v. York (not yet officially reported) L. Ed., Advance Opinions, Vol. 89, page 1418.

QUESTIONS PRESENTED

The questions presented by petitioner's petition herein for a writ of certiorari are:

(1) Has the Circuit Court of Appeals erroneously held contrary to the applicable Oklahoma law that a mortgage upon an interest in an oil and gas lease is not a chattel mortgage?

(2) Has the Circuit Court of Appeals erroneously held contrary to Oklahoma law that a mortgage upon per-

sonal property contained in an instrument relating to real estate is not a chattel mortgage?

(3) Has the Circuit Court of Appeals erroneously failed to apply as the rule of decision in this case the comprehensive terms of a plain unambiguous statute of Oklahoma, to-wit:

Sec. 75, Title 46, Oklahoma Statutes Annotated 1941?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) The final decision of this case will have important results. The oil and gas fields in the mid-continent are usually discovered or opened up by independent operators whose resources are not unlimited. Mortgages upon producing oil and gas leases are commonly used to finance their operations. Additional advances under these mortgages are frequently required from time to time by many of these operators, although such advances are not used upon the particular mortgage security, but are used for other purposes; such as meeting payrolls; starting new drilling operations, etc. Unless the mortgagees of such independent oil operators can be protected in making such advances from the intervening liens of subsequent creditors, the whole method of present financing in Oklahoma will have to be revised. Under the decision of the Circuit Court of Appeals, optional advances by the mortgagee of oil and gas leaseholds or interests in oil and gas

leaseholds are virtually eliminated for all practical purposes because of the hazards of intervening claims.

(2) The Circuit Court of Appeals has declined to apply the plain terms of an unambiguous statute of Oklahoma to the case at bar and has in effect by judicial construction created an exception to the all inclusive terms of the statute, under circumstances which call for no construction. The statute, Sec. 75, Title 46, Oklahoma Statutes Annotated 1941, by its terms applies to the holder of "any chattel mortgage," meaning the holders of every kind of chattel mortgage known to Oklahoma law. Yet the Circuit Court of Appeals by its decision herein creates an exception to this comprehensive term of the statute by denying the protection of the statute to the holder of a chattel mortgage contained in an instrument affecting or relating to real estate. Only the people or the courts of Oklahoma should create such an exception. It is the proper function of the federal courts to ascertain what the State law is and not what it ought to be. *Klaxon v. Stenton Mfg. Co.*, 313 U. S. 487, 85 L. Ed. 1477. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a state or a federal court and whether the remedies be sought at law or may be had in equity. *Guaranty Trust Co. v. York*, decided June 18, 1945, not yet officially reported, L. Ed. 89, page 1418.

SPECIFICATIONS OF ERRORS

Petitioner says that the United States Circuit Court of Appeals for the Tenth Circuit has erred:

(1) In erroneously holding that a mortgage upon an interest in an oil and gas lease is not a chattel mortgage, contrary to applicable Oklahoma law.

(2) In erroneously holding contrary to Oklahoma law, that a mortgage upon personal property contained in an instrument relating to real estate is not a chattel mortgage.

(3) In failing to apply as the rule of decision herein, the comprehensive terms of a plain unambiguous statute of Oklahoma, same being Sec. 75, Title 46, O. S. A. 1941.

PRAYER

Wherefore, petitioner prays that a writ of certiorari be issued by this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit to the end that the same opinion and decree of said United States Circuit Court of Appeals for the Tenth Circuit in said cause of The Continental Supply Company, a corporation, Appellant, vs. H. G. Marshall and The Federal National Bank, Shawnee, Oklahoma, Appellees, No. 3057 be reviewed by this Court as provided by law, and that upon

such review said decree be reversed, and that petitioners have such other relief as to this Court may seem appropriate.

MARK GOODE,
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